Pamphlet 12
by J. A. Fisher
Harrisburg, 1827

R. Lowe

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TO THE PUBLIC.

Having been suspended for an unlimited time, from practising as an Attorney of the several Courts of Dauphin County, by Samuel D. Franks, Esq. for an alledged contempt of Court, in using, what he considered insulting language to him, on the 28th of July last, induces me to lay before the public, my answer, (read in open court, in my defence, on the 7th instant, and filed of record) to the Rule to shew cause, why I should not be stricken off the list of Attorneys, or suspended from practising, &c.

I respectfully submit it to the public, under the fullest conviction, that it will be found to contain, a complete vindication of my conduct, and language. I ask but an attentive perusal of it, and am contented to await with pleasure, the opinion of every unbiassed and intelligeut mind, and if it does not result, in the conclusion, that the Judge, has been actuated by *improper, and vindictive,* and not by pure motives, in enforcing the Rule against me, I shall be very much mistaken, in my own opinion on the subject.

And here I would ask, if the Judge was not actuated by *improper and vindictive motives* towards me, why make me, the object of his vengeance, and permit insults, and indignities, of a much darker shade, to be so repeatedly offered to him, *with impunity, by the senior gentlemen of the bar,* both before, and after the expressions used by me, *and within the same hour that he ordered the Rule to be entered against me.*

In addition, permit me to enquire, if there is no appearance of *vindictiveness,* in the order of the Judge, suspending me from practising, in the "several courts of Dauphin County, over which he presides," and thus extending the Rule, further than the terms of the Rule, authorised him in doing, for he might, with as much propriety, have suspended me from practising, in the "District and Circuit courts" of this county, as from the Oyer and Terminer, Orphans' Court, and Quarter Sessions of Dauphin County; over which courts he presides.

Upon an examination of the Rule, ordered by Samuel D. Franks, Esq (Judges Bucher and Green being absent) at an adjourned court of Common Pleas, it will be found, that the Rule is expressly confined, to that *court alone,* and does not extend to the Oyer and Terminer, Orphans' Court, and Quarter Sessions, of the county of Dauphin, from which he has suspended me. That he has extended the Rule further than he was warranted in doing by the terms of the Rule, is most manifest; for, being the only Judge upon the bench, at the time the alledged contempt was committed, and the Rule entered, he did not constitute a court of Oyer and Terminer, Orphans' Court, or Quarter Sessions; the act of Assembly organizing the courts, requiring, *two Judges* to be in attendance, the President being one, to constitute the first named court, and to constitute the second and last mentioned courts, there must be *two Judges* upon the bench.

It will appear on a careful examination of the opinon of the Judge, taken in connection with the authorites cited by the counsel, and the facts as they appeared in evidence, that the opinion of the Judge, "*was a violation of all the Law and facts in the case.*" Is it then, a contempt, *to express a correct opinion* of the decision of a Judge; if it is, I have only to add, that I will ever be guilty of a similar contempt, for I will never hesitate to express the like opinion of the decisions of the Judge, whenever he grossly violates all Law, and prostrates all the justice of a case, as he has done in the case of Grebill and wife, vs. Zeither.

JOHN A. FISHER.

Harrisburg, Sept. 10, 1827.

THE ANSWER

To a Rule entered on the 28th July, 1827, by Samuel D. Franks, Esq. President Judge, of the several courts of Dauphin county, in the absence of Jacob Bucher and Innes Green Esqrs. his associates.

"*July* 28, 1827. *The court direct a Rule on John Adams Fisher, Esq. to shew cause why he should not be stricken from the list of attorneys of* this court, *or suspended from practisiug in* said court, *on account of what the court consider a contempt of court this day in using what the court, deems improper and insulting language towards the court, aud fix (at the request of John A. Fisher,) Monday of the next court, to determine the case.*" "*Sept.* 7, 1827. *The court direct the answer to be made in writing.*"

To this Rule, thus entered, the respondent being called upon to answer, in his defence saith. That on the 28th of July, 1827, after Judge Franks, had read his opinion in the case of the President of the Orphans' court for Herman Grebill and Susanna his wife, late Susanna Zeither, against John Zeither, surviving recognisor, &c. on a Rule, to shew cause why the judgment should not be opened, entered at the instance of Thomas Elder, Esq. the attorney for John Zeither the defendant, the respondent rose, and stated to Judge Franks, that he had omitted to state in his opinion, as appeared in evidence on the argument, that the bond was not taken for, and did not include, one years interest on $62 25½, the share of Susanna Zeither, due 6th March 1812, and also that the bond was made payable on or before Susanna Zeither arrived at the age of twenty-one years, and wished it to be stated in the opinion, that the respondent might take advantage of it, on a revision by a superior tribunal, of a decision, which the respondent said, he considered, "*an outrage upon all the law in the case:*" Judge Franks then remarked in a violent and angry manner, that the language used by the respondent, "*was highly improper and very ungentlemanly.*" To which language, the respondent being irritated, at what he deemed an insult publicly offered to him, by the honorable President, answered; "that he (the respondent) would stand or fall by what he had

said, and would repeat, "*that he* (the respondent) *considered the decision as an outrage upon all the Law in the case.*" These are the very words used by the respondent, a memorandum in writing of the transaction having been made by the respondent, immediately after the rule had been entered against him, and preserved by him. The respondent, solely with a view to the more full and perfect understanding of his defence, begs leave to submit a statement of the question out of which the rule had its origin, together with a synopsis of the facts as applicable to the case, the nature of the motion, the reasons advanced in support of the rule, the ground upon which it was resisted, and the law of the land, as applicable to and governing the case, in conformity to which the respondent avers the decision ought to have been.

A suit was instituted by the respondent as the attorney of Herman Grebill and wife, in the Common Pleas of Dauphin county, to March Term, A. D. 1821, No. 156, on a recognizance in the Orphans' court of said county, in the name of the President of the Orphans' court, for the use of Herman Grebill and Susanna his wife late Susanna Zeither, against "John Zeither, jr. surviving recognisor with Jacob Zerker deceased," to recover the distributive share of the said Susanna, in the real estate of her father, which had been taken at the evaluation on the 6th day of March, 1811, by John Zeither the defendant, who entered into a recognisance on the same day, with Jacob Zerker as his security, conditioned for the payment of the distributive shares of the several heirs and legal representatives of John Zeither, deceased, of whom Susanna the plaintiff was one, on which suit a judgment, according to the act of Assembly, and the practice of the court, was taken against John Zeither, jr. on the 27th June, A. D. 1821, at the June term, *which judgment, was subsequently, to wit, on the* 18*th July*, 1821, *marked for the use of Michael Cassel*, by this respondent, by the command and at the instance of Herman Grebill, the plaintiff, in interest in the judgment. On this judgment, a *Fieri Facias* was issued by the respondent to Oct. T. 1821, No. 17, which was returned "Levied upon a tract of Land in Swatara township, Dauphin county." On the 21st January, 1822, *after*

the fourth term, from the bringing of the suit had elapsed, Thomas Elder, Esq. *in the absence of the respondent*, obtained a "rule to shew cause, why the judgment in this case should not be opened, and in the meantime proceedings to stay," and at the same, time, filed an affidavit of John Zeither the defendant, which stated "that he hath a just defence to the whole of the plaintiffs' demand in the above suit: that on the 17th day of Sept. 1812, by and with the consent of Abraham Ebersole, who was at that time the guardian for Susanna Zeither now the wife of the plaintiff, Herman Grebill, a bond was taken for her distributive share of the valuation money of her late father's real estate, and which was secured by the recognisance on which the above suit was instituted for $62 25, payable with interest when the said Susanna should come of age. That he was from home when process was left at his house by sheriff, and on his return believing that nothing could be done to his prejudice, and being an illiterate and very ignorant man, not knowing the English language, though he learned to write his name, he neglected to appear not knowing what should be done, until judgment was entered, and exetion taken out."

On the 27th July, 1827. The rule *thus obtained*, came on for argument, and in support of the rule, *a cancelled bond*, was produced by Mr. Elder, dated Sept. 17th, A. D. 1812, executed by *John Hemperly, and Nicholas Alleman* as surety, conditioned for the payment of $62 25, "*payable to John Zeither, or to his certain attorney, executors, administrators and assigns*, on or before Susanna Zeither, one of the children and heirs of John Zeither, late of the county, aforesaid, deceased, shall come of age, together with lawful interest for the same from the 6th day of March, last past, for and during said term," accompanied with the parol testimony of Mrs. Baughman, and John Hemperly, the first named of whom swore in substance that "when John Zeither got the bond, Ebersole said that was the way he wanted it, that the bond was made that Susanna Grebill should get the money when she came to be 21, that her guardian agreed so, that Susanna was born on the 2d Feb. 1803, that John Hemperly bought a piece of this land from

John Zeither, and that this bond was given for Susanna's share out of her fathers landed property, which John Zeither took at the appraisement." And the latter, to wit, Hemperly, swore: "That the day this bond was given as security for Susanna's share out of her fathers landed property, Ebersole was present, as also the mother, John Zeither, and the witness, that he (the witness) gave the bond for payment of Susanna's share, that at the time the bond was given, Ebersole said he gave up his guardianship, and would have nothing more to do with it, saying that he was a very old man, that John Zeither should take the bond, and keep it until Susanna came of age, this bond was to be paid by me when she came of age, that his bail had paid the money due upon the bond to Mr. Elder, and that witness paid it to Alleman his bail, four years ago this last spring, and that Alleman had not paid the money, until I paid him. That he purchased seven and an half acres of this land, and that the bond had been in Harrisburg, ever since it was paid; that he paid $110 on the bond, and that Geo. Smith owned this land in 1821."

In opposition to the rule, the respondent produced the recognisance, which was entered into on the 6th March 1811, *pro ut* said recognisance entered in Orphans' court, docket "C" page 464–5, and release from Herman Grebill and wife to John Zeither, dated 5th Nov. 1821, for the distributive share of his wife, in the real estate of her father which had been taken under proceedings of the Orphans' court, by John Zeither, recorded 7th Nov. 1821, which release was subsequent to the judgment. It was also stated to the court by my colleague, and admitted by Mr. Elder, that he, (Mr. Elder) had offered to pay the amount of the judgment, if the release was executed. And it was contended, by the respondent and his colleague, *that taking the bond and the facts as proved by the witnesses, they did not amount to a satisfaction of the recognisance, or an extinguishment of the right of plaintiffs to sue upon the recognisance, and recover her distributive share in her fathers real estate, under the recognisance*: That the law as respects extinguishment, (which is defined to be, "wherever a right, title, or interest, is destroyed, or taken away

by the act of God, operation of law, or act of the party,) *was well settled ,and in order to operate, the creditor must accept of a higher security, in lieu of the first, before it operates, as an extinguishment of the first security.* It was advanced, and the law was shewn to be well settled, "that if a creditor upon a promissory note, accept of a bond for the amount of his debt, from the *debtor*, that the creditor could not sue upon the note, but must proceed upon the bond alone, 1 Dall. Rep. 388. So, "if in England, a man accepts of a bond for a legacy, he cannot *sue for his legacy* in the spiritual court, for by the bond, the legacy became extinct, and was considered a mere debt at common law; that if a bond creditor, obtains judgment on the bond, or has judgment confessed, he cannot afterwards bring suit upon the bond, for the bond is drowned in the judgment; and that the rule was general, that if a creditor accepts of a higher security, than he had before, it operated as an extinguishment or satisfaction, of the prior debt or security," and for these positions, 2 Bac. Abr. page 452 was cited, and read by respondent. But it was contended in opposition to the rule, "that in order to make a subsequent security, operate as an extinguishment, or satisfaction, of a prior security, "*the security must be of a higher nature or dignity to the first security and accepted in satisfaction of first security and not one of an equal or inferior dignity,*" that in this case, it could not be pretended, that the bond of *Hemperly and Alleman to John Zeither the recognisor and the defendant*, could, or would operate as an Extinguishment, or satisfaction of the debt due by recognisance, and consequently did not, and could not, bar plaintiffs right to sue and recover upon the recognisance: First, because *the bond was given by a third person, to a third person and that person, the recognisor the defendant in this case and the person indebted on the recognisance;* and to this latter point 2d Bac. Abr. 452 was read, as being an authority, expressly in point, where the law is clearly and explicity laid down, "*that a bond given by a stranger, to another person, to whom a third is indebted, is not even an extinguishment of a simple contract debt;* and it was argued therefrom, that

if a bond so circumstanced, was not an extinguishment a simple contract debt, much less *could this bond, given by Hemperly and Alleman third persons, to John Zeither, jr the person indebted, and not "for the use of the said Susanna" or any person for her,* operate as an extinguishment, of Susanna's right to sue upon the recognisance, when she, or her husband, or even guardian thought proper. Secondly, it was contended, *that as the bond was a security inferior in dignity, to the recognisance, it could not operate;* that the bond was a mere personal security, and could not be a lien upon the real estate of the obligors, until after judgment; whereas the recognisance, was not only a personal security, but also a lien upon the lands of the recognisor, taken under the proceedings in the Orphans' court from its caption, and bound them in his hands, and in the hands of his alienee, or alienees, and that in Baetie vs. Smith, 4th Yeates 103, the Supreme court say "*unquestionably a recognisance in the Orphans' court is in the nature of a judgment*"

The respondent and colleague, further said, that even admitting that the bond was a security of equal dignity with the recognisance, it made no difference, for that the law was settled, that the accepting a security of equal dignity with the first, is not an extinguishment of the parties right to sue upon the first security, and cited the case, of Manhood vs. Crick, Cro. Eliz. 706, where it was decided, in an action of debt upon a bond for *l*8, that the acceptance by the obligee, of a subsequent bond, did not operate as a bar to the obligees suing and recovering upon the prior bond. They also shewed that the *acceptance* of a bond *with sureties*, did not operate as a satisfaction of a bond *without sureties*, and to this point read, the case of Norwood vs. Grype, Cro. Eliz. 727, where, in an action of debt upon an obligation *without sureties*, for *l*8, the obligor pleaded the acceptance by the obligee, of a subsequent bond *with sureties*, in satisfaction of the former bond *without*; it was determined without argument, that, "one deed cannot determine a duty upon another deed," and consequently, that the suit was well brought *on the first bond*, and judgment was thereon accordingly rendered for plaintiff:

And that in Cro. Car. page 85–6, the law was abundantly laid down to the same effect.

The respondent next read, the very strong case of Cumber vs. Wane, 1st Strange 426, wherein it was decided, that "*one bond will not operate as an extinguishment of another, without a bettering of the plaintiff's case, as by shortening the time of payment, and that in all cases, the bettering of his case was not sufficient,*" and to shew the force, and peculiar applicability of this last case, to the question then before the court, recurred to the facts, *that at the time the bond was taken, the money was due upon the recognisance, and also that it postponed the time of payment for* TWELVE YEARS, *and that so far from bettering the plaintiffs case, it placed them in a worse situation, one years interest on* $62 25, *being entirely lost to them, and the security not even payable to them, or to their use, or any person for them or either of them, and being a mere personal surety was inferior in point of dignity, and of course inferior in point of safety.*

The respondent and colleague having progressed thus far, and shewn that the acceptance of a security of equal dignity with the first, did not, and could not operate as an extinguishment or satisfaction, of the first security, contended that this being the law, a *fortiori* that the acceptance of one of an inferior degree, as the bond in this case unquestionably was, did not and could not operate as an extinguishment of the party's right to proceed on the recognisance, which unquestionably was in the nature of, and was in effect a judgment; and then produced and read, 2d Bac. Abr. 452, where it is laid down, that "*if a bond be accepted in satisfaction of a judgment it is no extinguishment.*

To this point the case of Lutterford vs. Le Mayre, Cro. Jas 579, was also read, where a judgment had been obtained for *l*200, and the defendant pleaded, that after the judgment had been obtained, he had given bond to the plaintiff, which had been accepted by the plaintiff, in satisfaction of the judgment, and averred, the bond to be, for the same debt; and it was adjudged by the court, "that such bare surmise which is but matter of fact, is not sufficient to avoid a judg-

ment; and being but to give another action upon bond, is not sufficient to avoid a bond, *a multo fortiore* is not sufficient to avoid a judgment," and the case of Noyes vs. Hopgood, Cro Jas. 649–50 where in an action of debt upon an obligation for *l*80, conditioned for the performance of certain covenants containded in articles of agreement, defendant pleaded that it was agreed betwixt the plaintiff and defendant, that he should grant an annuity of *l*5 out of certain land for life, in discharge of the bond, which grant he made accordingly, and the plaintiff accepted it in discharge of the bond, &c. whereupon it was demured, and without argument upon the first motion, adjudged for the plaintiff, "for it is but a concord and verbal agreement which can never be a discharge of a specialty." And in Balston and wife vs. Baxter, Cro. Eliz. 304, that the law was there settled, that where there was a promise to pay *l*6 down, and *l*4 at a future day, in discharge of a bond of *l*10, *and the l*6 *were paid down*, that it did not operate as a discharge of the bond for *l*10.

The respondent then added that this being the well settled law of England, prior to the revolution, was conseqently authority here, and binding upon the court, unless those principles had been contravened, or impugned, by the decisions of our own courts, which the respondent apprehended was not the case; on the contrary, the respondent alledged that they had been expressly recognised to be the law here, as they had undergone revision by, and had received the sanction of the Supreme court of Pennsylvania, in the case of Hamilton's Ex'or. vs Callender's Ex'ors. 1st Dallas 426 where that very learned, and distinguished chief justice, M'Kean, lays down the law to be, "that a bond is not a payment *pro tanto* of the money due upon a mortgage, and says that he will content himself with declaring the general principles, and referring to the authorities whence those principles are deduced." *First then*, (says the chief justice) *one judgment cannot be pleaded in bar of another;* Cro. Eliz. 8 7. 2d Bac. Abr. 452. "In the second place, *a bond which is no satisfaction of another bond cannot be deemed a satisfaction of a mortgage, which is a security of a higher nature. To render it*

a satisfaction, it ought to better the plaintiff's case, in point of safety, and expedite the time of payment for a bond with sureties, will not be a satisfaction of one without, unless the time of payment is thereby shortened: and cites the following cases, many of which were read, with others, by the respondent on the argument, 1st Stra. 427, 1st Brownl 71 74, Hob. 68–9, 1st Mod. 225, 2d. Mod. 136, Cro Jas. 579, Cro Car. 85–6, 3d Levinz 55, 1st Salk 124, 1st Burr 9, 2d Wilson 87 "And also that no debt or duty can be extinguished but by a security of a higher nature than the first."

The case of Bantleon vs. Smith, 2d. Binn. 146, was also read by the respondent, in which case Hopkinson moved to take out of court, the plaintiff's debt, interest, and costs, upon the following case; the plaintiff had conveyed to the defendant a lot of ground, reserving an annual rent, with power to "enter and distrain and for want of sufficent distress, to hold the land, until the arrearages should be fully paid." The deed, also contained, a covenant by grantee, to pay the rent, and rent being in arrear, plaintiff brought covenant, and obtained judgment, upon which, the lot had been sold, and the money brought into court. There were several judgments, prior to plaintiffs, sufficient to absorb the proceeds of sale, but a priority was claimed by plaintiff, to the amount of his rent in arrear which was opposed upon various grounds, *the most prominent of which, was, "that the rent was extinguished by the judgment in the action of covenant;* but the court decided *that the rent was not extinguished, by the judgment in the action of covenant, and that the plaintiff was entitled to receive, the amount of his rent, in exclusion of the prior judgments.* And in the case of Byrne vs. Byrnes Ex'ors. 3d Sergeant & Rawle 61. The Supreme court, Judge Yeates delivering the opinion of the court, say, "that a debt or duty which is certain, shall not be merged or lost by an uncertain or contingent recompense, and whatever is to be a satisfaction of a debt, ought to be so in its creation, and at the very time it is given."

It will also be remembered, that the respondent contended, that "a court will never set aside a regular judgment by default, to give the defendant advan-

tage of a nicety in pleading," which would be the effect of opening the judgment by default in this case, and to this point read 1st Tidds Practice 508, and the case of Forbes vs. Lord Middleton 2d Strange 1242.

The respondent further contended that the *laches* of the defendant in not applying for the rule in time, was conclusive *against him*, and against the rule, the respondent shewed to the court, that *seven months*, had elapsed, between the period of obtaining the rule, and the judgment that the suit was brought to March T. 1821 and the judgment, had in June T. A. D. 1821. That an execution issued to Oct. T. 1821, returned, levied upon real estate, Dec. T. 1821 elapsed, and at an adjourned court, held on the 21, Jan. 1822, the rule was obtained *in the absence of the respondent.* And then added that a court, having a due respect for the administration of the laws, would not, and could not, consider themselves justified, in opening a regular judgment, obtained, agreeably to the acts of assembly, and the practice of the court, after the *laches* which the defendant was guilty of, in suffering seven months to elapse, from the obtaining the judgment, before his application for the rule; that the law was well settled, both in Pennsylvania and New-York, that where the defendant, has lost a Term, and the plaintiff an opportunity of a trial, the courts would not interfere in any way.

That in England, the courts will set aside a regular judgment by default, *where the plaintiff has not lost a trial, upon an affidavit of merits, pleading issuably, and payment of costs*, and cited to this point, 1st Tidds Practice 507, 1st Salk. 402. But even in cases where application is made to the discretion of the court for relief, *there must be no delay, either actual or affected*, which principle is clearly laid down in 2d Salk. 518 That in New-York, in the case of Lansing vs. Horner, Coleman & Caines cases 445, the court refused to set aside a default, because of the *laches* of the defendant, in suffering *one term* to elapse. That in the case before the court the defendant had suffered *two terms* to elapse without moving in the case. That in Edwards vs. M'Kinstry, Coleman & Caines cases 125, notwithstanding the plaintiff had not lost a trial, the court refused to set aside a default. "That in

Jackson vs. Stiles, page 443, same authority, the court refused to set aside a default, on the affidavit of their being "*good and substantial defences,*" without swearing to merits. And in Beekman vs. Franklin, Coleman & Caines cases, page 446, it was decided, "*that ignorance of the necessity to employ an attorney, previous to the trial of a case, is not sufficient to induce the court, to set aside a regular judgment by default, and subsequent proceedings, tho' accompanied with a strong affidavit of merits.*

The respondent further to maintain the position he had taken, read from "Notes on Pennsylvania practice," page 34, the following: that in Pennsylvania, "a judgment by default, altho' execution be taken out, and served, the judgment may be opened, and execution set aside, *on payment of costs, pleading the general issue, and taking short notice of trial.* It is however not granted as a matter of course, even when accompanied with an affidavit of defence, *but upon certain conditions.* And the great and leading question is, "*whether the plaintiff have lost a trial,* that is, if the trial would have been over, if the defendant had made no default, but would have appeared and pleaded."

If the plaintiff have not lost a term, no hardship can accrue from setting aside the judgment. The respondent shewed the applicability of this last position, to the case then before the court, by shewing that, in that case, *the plaintiff had lost two, if not three terms.* And in addition, the respondent from the authority last mentioned, shewed that the law was laid down to be, that, "*a motion to set aside the judgment must be made at the third term at furthest,* when by the course of the courts, the cause is entitled to trial;" that in the case before the court, *the motion was not made, until nearly a month after the fourth term had elapsed:* and "that as the privilege of opening judgments by default, was not due, *ex debito justitiæ* but granted *ex speciali gratia* to the defendant, *the courts will always insist upon the strict performance of those conditions.*"

To this mass of well settled law, the counsel for the defendant, opposed the following cases, which on examination, will be found not to have had, any applicability to the case then before the court. The case of

Musgrove qui tam vs. Gibbs, 1st Dall. 217, which was an action *qui tam*, &c. on the act of Assembly against usury; in the course of the trial of which, the court resolved the following point, among others, which was the only one read by the counsel, in support of the rule, "Shoemaker & Shirtliffe, borrowed several sums from the defendant, and gave their notes, payable in a month, with interest, at the rate of *five per cent.* per month added to the principal. When these notes became due, they could not pay the money, but drew new notes, making the principal and interest of the former notes, *(which were given up by the defendant,)* principal, and again adding the same excessive interest upon the aggregate amount;" upon which state of facts, the court "resolved, that altho' no money was actually paid to the defendant, the second notes were a satisfaction of the first; and the usury was complete on the defendants accepting them, as thereby the original contract between the parties was extinguished," and by M'Kean, Ch. J. "it is well established, that the receipt of one thing, in satisfaction of another, is a good payment; as the acceptance of a horse in lieu of a sum of money, or of a bond by a third person in discharge of a prior obligation.

The foregoing case may upon first impressions be considered as having some application to the case then before the court, but upon reflection, every unbiassed legal mind, will readily perceive, that it can have no application whatever, for in this case, the notes were received in payment, by the person, to whom the money was actually due, the original notes given up, and the original debt, with the evidences of the debt cancelled and extinguished; whereas the bond in the case before the court, was given to the recognisor, for a debt due to himself, from his own debtor, and not to Susanna Zeither, or any person for her use. The *dicta* of the chief justice, must therefore be confined to the subject matter of the case itself, (usury) and to the acceptance of the satisfaction; should it be carried further, it would be in direct contravention of the subsequent case in the same book page 420, Hamilton's Ex'or. vs. Callender's Ex'ors. decided by the same court, upon mature consideration, one year after, and

to all the authorities both in England and Pennsylvania heretofore cited by the respondent.

The case of Willing & Francis vs. Consequa, 1st Peters, 305–6, was on a question as to the competency of a witness, on the ground of interest, and consequently not applicable. The case of Parker et uxr' vs. United States, 1st Peters 262, was an action for money had and received, brought by the acceptor of a bill of exchange, before the same had been paid by the acceptor, in which case judge Washington, among other *dicta* says, "if the vendor of property, accept of a note or bill in satisfaction of his debt, he is paid by his own agreement, and will not be allowed to sue for his original debt; in derogation of that agreement:" The force of which observation cannot, be perceived by the respondent, when applied to the case of Grebill and wife vs. Zeither.

The counsel for the defendant to support his rule, next read, the case of Watts vs. Willing, 2 Dallass 100, which was the case of a defendant, who had joined as surety in a bond for Mark Bird, and was sued on the bond, without joining his principal; it appeared in evidence, that sometime after the bond was given, Bird delivered to the plaintiff, certain bills of exchange; which as appeared, *by an indorsement on the bond, were to be credited in part payment, when paid.* For several years no suit was instituted, on the bond, and Bird's circumstances became greatly embarrassed. The bills had been duly protested for non payment; and the plaintiff (who had never returned them, nor even, at the trial, did he offer to return them) furnished accounts, in which he charged 20 *per cent* damages. The question therefore was, whether the bills, were, under these circumstances, to be considered as a payment of so much of the bond? And the court in their charge to the jury, ruled; "that originally the plaintiff had his election to consider himself either as an agent, or as a purchaser, with respect to the bills of exchange; but that the two circumstances, of retaining them in his own hands, and of charging 20 *per cent* damages, were sufficient evidence to shew, an election to receive them in payment; and that, therefore, for the amount of the bills, the defendant was entitled to be credited in an action on the bond.

Much stress was laid upon this last case, by the counsel for the defendant, on the argument., but let it be remembered, that in the case of Grebill and wife vs. Zeither, there was no surety interested, nor was it attempted, to make any other person liable in that suit, but John Zeither jr. the recognisor; that there was no acceptance by Susanna of the bond, nor does it appear from the evidence, that she ever had notice of any such bond being taken, that it never was credited, or any notice taken of it on the recognisance, that the bond never was in her possession, or that of her Guardian, that the bond was not even payable to her, or any person for her use, but was made payable to John Zeither, the recognisor, the person indebted to her on the recognisance, "and his Executors, Administrators, *and assigns*" That she was completely in the power of her debtor, who might if he had chosen, by the very terms of the bond, assigned it away from Susanna, by which, if the bond operated as a payment, or satisfaction of her debt on the recognizance, she would have been defrauded of her share in her father's real estate, and left perfectly remediless; let these facts be borne in mind, and no lawyer, would or could say that the case of Watts vs. Willing, had any application to the question then before the court.

The defendant in support of the Rule, next read the case of Plankinhorn vs. Cave, 2 Yeates 370, in which it was ruled by the court, "that the acceptance of *negotiable instruments*, on account of a prior debt, by judgment, which was taken as a security for the payment, by instalments, of two notes, from the defendant to plaintiff, (and it appeared by the plaintiff's book of accounts, that certain indorsements, on inland bills of exchange, made by the defendant to the plaintiff, had *actually been credited "on account of defendants notes due and unpaid."*

The court held "that the indorsements, were made by the defendant, to the plaintiff, in discharge of the first instalment, in the common and regular course of business, there being no proof to the contrary." This decision was founded upon the entry in the plaintiff's books, and on the grounds, that the indorsements were *prima facie* evidence of payments, for if the notes or bills had been paid, or if they had been indorsed over

so that they were not forthcoming again to the defendant, and he might be sued upon them, by any third person, that would amount to payment.

How does this case apply here, the bond was not a *negotiable instrument*, Susanna never could have received the money on it, she never could have assigned it to a third person, as it was not payable to her, she never had received any benefit or advantage from it, nor could she ever have received any, until John Zeither would assign it to her.

The principles decided, in 10th Johns 587 and cited by the counsel for defendant, "that if an obligee does an act to the injury of the surety, or varies the terms of the obligation, or enlarges the time of performance, without his consent, the surety is discharged;" and 17th Johns 384 "where a creditor does an act injurious to the surety, or omits to do an act when required by his surety, which his duty towards the surety enjoins him to do, and the omission is injurious to the surety, the latter is discharged, and may set up such conduct of the creditor, as a defence to a suit against him at law," have not the least applicability to the case then arguing, for there was not, as was before stated, any surety interested in the case, or sought to be in any manner affected, by the suit of Grebill and wife, but John Zeither the recognisor.

The counsel further in support of the Rule, read from Wharton's digest 286 No. 12. 13. the following principles, "*It seems* that if A be indebted to B, and B draws a bill on him in favor of C, which is accepted and debited to B, in the books of C, the original debt is discharged;" and "If a bill of exchange be taken in payment and discharge of a pre-existing debt, such debt is thereby discharged: For the first of these principles, the compiler of the digest, cites Brown and others vs. Ketland, C. C. April, 1805, M. S. Reports, and for the latter, Bourne vs. Jackson, C. C. April, 1807, M. S. Reports. The answer to these *scraps of cases* is ready, *a negotiable instrument* is considered in law to amount to a payment, particularly *where it is accepted as such*, which from all we can gather, was the fact in those cases; but a *bond or obligation* was never considered in law a payment, nor can any case be shewn where it was held that a bond, although

accepted, by the debtee, from the debtor, was considered a payment of a security of a higher nature. In these cases too, the notes passed from the person indebted; to the person to whom he was actually indebted; in the case before the court, the bond was made *payable to the debtor of the plaintiff, by his debtor,* and never was received by the debtee on the recognisance.

After the Argument the Judge took until the following morning to consider the case, and then delivered the following opinion in writing:

The President of the Orphans' court, for the use of Greybill and wife. *vs.* John Zeither jr. surviving recognisor, &c.	Scire Facias March T. 1821, No. 156, on recognisance in the Orphans' court. On rule to shew cause why the judgment by default should not be set aside.

OPINION OF THE COURT.

"The Defendant in this case asks for the interposition of the legal discretion of the Court in granting "him relief on various grounds which plaintiffs "oppose. It is not necessary for us to review the "whole of them and decide upon all the points which "have been incidentally introduced in support of the "positions taken by both parties—and therefore we "shall confine ourselves wholly to the matters upon "which our decision is founded. The defendant "took the Real Estate of his father at the valuation "under proceedings in the Orphans court—he entered "into a recognizance for the payment of the shares of "his mother and his several brothers and sisters—one "sister, viz. Susanna one of the plaintiffs had for her "Guardian Abraham Ebersole—some time after the "property had been decreed to the defendant he sold "part of it to a certain John Hemperly—at the time "of the Execution of the contract of sale between "them, the widow—heirs or the Guardians of the "minors were present, and Abraham Ebersole the "Guardian of Susanna a minor born on the 3rd Feb. "1803 being present, ordered that the purchaser "should execute a bond with security unto John the "defendant for the sum of $62 25 the share of the "Estate then due to her with interest, *payable when "she would arrive at the age of twenty-one years* "Saying at the same time that the bond should be

"executed to John who could at the time of her com-
"ing of age receive the money and pay it to her for
"that he himself was too old to attend to the business
"and would have nothing to do with it, but would
"give it over to him—the Bond was accordingly
"so executed by Hemperly being made payable to
"defendant on or before Susanna's attaining the
"age of 21 years and for the sum then due to her
"bearing interest from 6 March 1812 with surety
"in the bond. Susanna married Graybill—and two
"years and more before she arrived at the age of 21
"years, the present suit was brought on the recogni-
"sance by them

"The Guardian had a right to put out at interest
"the money of his ward—and he had a right to ex-
"tend the time of payment until she arrived at the
"age of 21 years, her debt was then bearing interest.
"He acted for her benefit and she and the husband
"whom she afterwads married are bound by his con-
"tract with her brother the defendant—John had no
"interest in the disposition of the money—by his
"recognisance he was bound—and, nothing but an
"actual payment, or something *in satisfaction and*
"*discharge of the Recognisance or a release could*
"discharge him and to him it was a matter of no con-
"sequence whether he received the money from his
"purchaser Hemperly or from any other source and
"paid over to Ebersole what was due to Susanna the
"minor—or whether he under the orders and agree-
"ment of Ebersole received for the payment of his
"own money a bond with surety from Hemperly
"for the amount of Susanna's share payable with in-
"terest on or before her arriving at lawful age—much
"has been said about the law of extinguishment and
"of the discharge of the surety in the Recognisance
"—these matters do not necesarily arise upon the
"present question—the only question of importance
"is—did Ebersole the Guardian enter into a contract
"or agreement which fixed the time of payment of
"the money now sued for, with John Zeither the
"defendant on the 2 Feb. 1824 that fact has been
"sufficiently established by the evidence—and this
"act of the Guardian is binding on the ward. There
"was a consideration on both sides. The Guardian

"was obliged by law if John Zeither paid him the "money to put it out at interest for the benefit of his "ward—defendant owed the money—the purchaser "Hemperly owed him—and therefore if the Guardian "directed that the bond with security to the amount "of the money then due his ward, should be made "payable to the defendant on or before her arrival at "lawful age—the defendant might agree to it, for it "was his own money which his sisters Guardian was "thus disposing of and he might at the same time be "Trustee—and also debtor upon the recognisance "would it then be just in us to say—that this con-"tract legally binding upon both parties—especially "as to the time of payment of Susanna's share (having "the lien of the recognizance as a security) shall "be disregarded and that the defendant shall be called "upon by the plaintiffs to pay money which he had "not yet received in consequence probably of that "contract of the Guardian and himself having put it "out of his power to receive it before the time stipu-"lated in the Bond. In our opinion it would be "unjust and oppressive—and the contract according to "the intention of the parties as it has appeared to us "in evidence must govern the case It has been alledg-"ed that defendant has no merits, every defendant has "merits who is sued before he ought to be called "upon to answer a demand which is not due at the "time of suit. The enforcing of his contract so far as "regards *the time of the payment of Susanna's* "*share* of the estate then due—is not an extinguish-"ment of the lien of the recognisance—that question, "if it ever should arise will depend upon matters "which it is not necessary for us in this question to "consider; we are of opinion that the rule be made "absolute. S. D. Franks.

"July 28, 1827.

On the above opinion being delivered, the Judge was asked by the respondent to amend it so as to comport with the facts, that the respondent might take advantage of them on a review by a Superior Tribunal of the decision, and the respondent did in the first instance *inadvertently say* that he considered the opinion "an outrage upon all the law in the case," and for the expression of those words he is to

answer in writing. It is the correctness of the Judge's opinion therefore, that is now to be investigated, and if the respondent does not convince, every intelligent and unbiassed mind, learned in the law or otherwise, that it is, "an outrage upon all the law and facts in the case," he is satisfied to submit without a murmur, and to abide by the result.

First then, as to the facts, the plaintiff when the bond was taken, was a minor, an infant of nine years old, it was made payable *to her debtor on or before she attained the age of twenty one years.* Her Guardian it is admitted did say, "*that he would have nothing to do with it,*" and these words, connected with his other declarations, are construed to mean, "that he delegated his powers over the debts due to his ward, *to the debtor himself,*" and on this ground the Judge founds his opinion, when every man acquainted with the plainest principles of law, must know, that a Guardian has only a personal trust, wholly for the benefit of his ward, and that this trust cannot be assigned, nor delegated to other persons by the Guardian, Vaughann's rep. 181, Gilb. eq. rep. 177. Plowden 293, the case in Vaughan is a leading case and has been followed ever since, and as such, cited by all the commentators from his time, down to the present day.

The respondent is at a loss to discover, where the *learned* Judge derived his law to support the opinion he has expressed, as to the Guardian's right, to put out his wards money, until she arrived at the age of twenty one: Surely, not from the common law, for when the ward arrives to the age of fourteen; he or she, may complel the Guardian to account, both at law and in equity: Nor under the act of 1713 1st Smith 83, Section 5th which expressly prohibits the loan *for more than one year:* The words are, "provided always, that the day of payment of the money so to be put out, *shall not exceed twelve months,* from the date of the obligation or other security given for the same." The words are imperative, "*shall not exceed twelve months;*" How then could a Judge declare, in direct violation of the words of our own statute, "that the Guardian had a right to extend the time of payment *twelve years.* "He had a right says the Judge to extend the time of payment, until she arrived at

the age of twenty one years, and she and the husband whom she afterwards married, are bound by his contract with her brother:" Then is not this part of the opinion of the *learned* Judge, *a violation of all law, both common and statutory.* For, neither the husband, nor the wife, were bound by what the Judge *presumes to be a contract*, for the plainest reason, the person with whom this contract was (as the Judge supposes) made, *had no power to make the contract.* It therefore being void in its creation, bound nobody.

The remainder of the *learned* Judge's opinion on this point, destitute as it is of legal premises, need not be any further pursued.

It remains to consider, the *learned* Judges opinion, on the doctrine of extinguishment, and here it is difficult to comprehend his meaning; he admits that "nothing but an actual payment, or giving something in satisfaction and discharge of the recognisance, or a release, could discharge the recognisor:" And then determines that a bond given to the recognisor John Zeither, by his debtor John Hemperly, with security if you please, and not to Susanna or any person for her use, and over which she had no control, and which bond, the same John Hemperly, swore was paid, to the obligee John Zeither more than four years before the decision of the learned Judge, and retained by him, never paid, or offered to be paid to Herman Grebill and his wife Susanna, nor brought into court to await the decision of the Judge, *but kept by John Zeither, in his pocket;* WAS A PAYMENT!!! But as the respondent has stated before, that all this part of the *learned* Judges opinion, was predicated upon false premises, he will pursue it no further.

But the *learned* Judge, concludes by saying, that "the enforcing of his contract, so far as regards *the time of payment of Susanna's share* of the estate then due, is not an extinguishment of the lien of the recognisance, that question, if it ever should arise, will depend upon matters which it is not necessary for us in this question to consider." The respondent must be permitted to ask, what then was before the learned Judge for his consideration? The respondent has already shewn, that he obtained a judgment on the recognisance, and issued his execution which had been

returned "levied upon a tract of land, &c." more than three months before the rule to open the judgment was obtained: It was in no stage of the case pretended, that the defendant John Zeither, or any person for him, had ever paid one cent to Susanna, or any person for her use, in discharge of the recognisance. The question then for the consideration of the learned Judge, simply was; was the bond so taken by John Zeither to himself, a discharge of his debt to his sister? was it a payment? was it in any way a satisfaction? for unless it was either one or the other, the recognisance remained in full force; and on this recognisance only could the suit be sustained: The question of extinguishment then, was the only point for the consideration of the Judge, and his opinion from the whole of his reasoning is founded on the very principle, "that the bond was an extinguishment of the debt by recognisance," and so he decided, for he ordered the judgment to be opened, and the execution to be set aside, without directing the judgment to remain, as in all other cases, a security for what might remain due. It has already been shewn that the Guardian of Susanna could by no law authorise such a bond to be taken; if it had even been taken to John Zeither for the use of his sister, limiting the time of payment twelve years after its date: and the law is abundantly settled, that if the bond had been so taken, it was no bar, to a suit on the recognisance, at any time, either by her Guardian Abraham Ebersole, whose power over his ward and her estate expired when she arrived at the age of fourteen, or by any subsequent Guardian appointed by herself, or by her husband on their marriage, though she was a minor, for by the marriage the husband became, not only the Guardian of her person, but the absolute owner of her estate, and would have a right to sue for, and demand it whenever he thought proper, and because it would not extinguish a debt of a superior degree. Then did not the opinion of the learned Judge violate all the law, on which this question depended.

The learned Judge forgot that on the argument of the case, it was stated by respondent's colleague, that about the time this rule was obtained, Mr. Elder the defendant's attorney, called on him, and stated that the money should be paid, if Grebill and wife would

execute a release to John Zeither for their distributive share, that the release was so executed and put on record, which was produced in court, and all admitted by Mr. Elder; but perhaps as this was not sworn to, his honor did not consider it proof, as he has no where taken notice of it in his opinion. The respondent however, with the little knowledge he possesses as a lawyer, has been led to believe, that, that which is admitted in open court, in the progress of a cause, is the best evidence of the fact so admitted, and so the law is well settled, and no *dicta* to the contrary is to be found in any book.

The Judge speaks of merits in the defendant; where are they? and in what do they consist? Merits, must constitute either a legal or equitable defence, such as payment, or satisfaction, or an eviction; neither exists in this case, as has been already shewn. He also speaks of the money bearing interest, did he forget that the recognisance bore interest? there is nothing in this which gives the defendant an equity, because it does not benefit his sister. The Judge says he acted for her benefit, how is this made out: If the learned Judge is right, he took a bond, from his debtor, to himself, not to her; and this bond, is to convert a real security, into a personal one: Is this for her benefit? She looses the land, and has nothing for it: She has no remedy on the recognisance: She has none on the bond: Her remedy, if she has any, would be an action on the case, for money had and received, and even that is destroyed by the release on record, unless it could be shewn, that the release was executed in consideration of the judgment. But the Judge says, "every defendant has merits who is sued before he ought to be called upon to answer a demand which is not due at the time of suit:" This is in this case, assuming a fact, without any law, (it is presumed) to warrant the assumption, as has been already abundantly shewn, and need not again be repeated. The defendant then having no merits, neither in law, nor in equity, it is submitted whether the judgment in this case, was not illegally and improperly opened.

The respondent states, that true it is, that he did make use of the language to the president of the court, in the manner before stated, yet he avers, that it was in the first instance, *inadvertant and not in-*

tended or offered by him, as an insult to the president, and would have been retracted immediately afterwards, had it not been for the *very decorous language* of the president, which induced the respondent to repeat the words at which the president took umbrage, the respondent conceiving at the time, that he had a a right so to demean himself, after the language which the president publicly applied to him.

The respondent, not with a view to exculpate himself, or to palliate what the president considers an offence, begs leave to call to the recollection of the president, some expressions used by several of the *senior members of the bar* to the president, which passed unnoticed by him, on a comparison of which, with the respondents language, he is encouraged to believe, that his, will be found to be, extremely mild and courteous. The respondent, will call the recollection of the president to a case, wherein he had made a decision, to the *form* of which, one of the counsel concerned objected, and said it ought to be altered: The president took up his pen, when a certain *senior member of the bar*, against whose client the decision had been made, walked up to the Judge's seat and addressing the president, said, "*You were going to alter it*," (meaning the entry of the decision); the judge replied "*no*," and the gentleman rejoined, "*yes, you were going to alter it, and you set there to do, just as they tell you.*" The same *senior member of the bar*, upon another occasion, addressed the president, saying, "*You are going to decide just as they*, (meaning the opposite counsel) *want you to decide.*" And upon another occasion "*that he had justice done him no longer in this court, and his client must be sent for and employ other counsel.*" The same *senior member*, at another time, in a passionate and angry manner told the president, that, "*there was neither law, nor justice in his court, and calling to his client said, come here, I will give you your money, you must employ somebody else, for I can do nothing for you here.*" At another time, the same gentleman said, "*God protect me from this court, I think I must sink through the floor. I will send for my client and let him employ somebody else. No justice here,*" and then added, "that he did not care whom it gratified, or whom it offended, that he was not so incon-

siderable in society, but he could have his redress. And upon several other occasions, the same *senior member*, said to the president, "*that he could expect no justice there,*" and asked the president "*if this was a court of justice? if justice had not fled?*" and again, "*that the opinion of the court was absurd, and that he would leave the court, as there was no justice to be obtained there :*" And it will be remembered that some of this language passed unnoticed, and to other of the expressions, the president mildly expostulated with the gentleman, striving to convince him, that the decisions were founded on pure motives, but took no other measures.

Another *senior member of the bar*, addressing the president said, "*He could not conceive that any court, assuming the name of a court of justice could so decide,*" and applied the word "CORRUPTION" to the president, and on the following day, the counsel when called upon by the president, for an explanation said, "what he had stated , he had done deliberately, and that he would not now retract from it." And the same gentleman upon another occasion said, "*that the decision of the court, was an abuse of law and justice, and that the rules of the court were judicial traps,*" and said, "*I would like to know where we are, whether in a court of law, or justice, or what kind of a court.*" A gentleman of the bar who has been in full practice, for twelve or fifteen years, in an adjoining county, in a case wherein the president had made a decision against his client, said to the president "*that the decision was nothing more than was to be expected from the scource whence it came.*" *A junior member* of the bar of this county, told the president, upon one occasion "that if a certain senior member of the bar (naming him) *had been concerned, he would have decided differently.*"

It will also be remembered, that within the *same hour*, that the Rule was entered against the respondent, two of the *senior members* of the bar (in a dispute about the distribution of money in the sheriffs hands, which one of the gentlemen wished the court to make at the time, and the distribution of the money at that time, was opposed by the other gentleman, who asked for time to see his clients) used language, to the following effect to the President: " If (said one of the

gentlemen) *the court are determined to go on, with the act of Assembly staring them grossly in the face, I will appeal, so help me God!!!*" and the other gentleman said, after the court had fixed Saturday of the first week of the next court to decide the matter; "*You might as well fix seven years after this, this is sporting with the rights of parties, and is a violation of the administration of Justice.*" The President then fixed Monday, the first day of the next court, for the hearing, when the last gentleman said, "I do not like to have the rights of my clients, sported with." This transaction, and the expressions used, will be remembered by many of the members of the bar, then present.

All the above cases, were passed over by the President, without any measures being taken, *or Rules entered*, to avenge the majesty of the laws, which had been insulted in the person of their administrator, *for reasons best known to the President himself*, the respondent not even pretending to conjecture on the subject: But at the same time that the respondent will avoid conjecture, he begs leave to remind that same President, that the JUNIOR MEMBERS of the bar have their rights, that they are aware of what those rights are, that they too are susceptible of feeling an insult and injury, and that some of them at least, if not all, cannot permit those rights to be invaded, or insults to be offered them with impunity.

The respondent cannot avoid remarking, that it is *very singular*, that he, a *Junior member of the bar*, should be signalled out by the President, as the object of a Rule, the enforcing of which, would be but to render him, *the first object in this district*, at which judicial vengeance was levelled, and consequently to render him an example, to those *Senior members of the bar*, who have been so long, and so repeatedly, permitted to indulge in invectives (to give their aberrations the mildest term) with impunity. The respondent will also add, that he has practised for nearly seven years, in the courts over which the honorable President presides, and that this, is the first instance of any complaint being made against the respondent, or any intimation that the respondent's conduct, manner, and language, could be considered as a deviation from the strictest decorum, in his professional intercourse

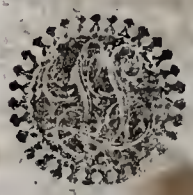
with the court; and that in this instance, much allowance ought to be made, to the irritated state of respondents feelings, excited as they were at the time, by *the language used by the president, publicly, to him;* bearing in mind, that the expression, when first used by the respondent was inadvertent, and not intended to convey any insult to the court, and that the repetition of it, was provoked, by the language of the President (to him) before alluded to and mentioned.

The respondent, in conclusion, takes the liberty of observing, that he is called upon to answer in writing generally, and not in the manner pointed out, by any practice, that has hitherto prevailed, in the doctrine of contempts, in Pennsylvania; a doctrine, which has ever been odious to her citizens generally. And as the same judge will probably set in his own cause, to whom the contempt is supposed to be offered, he knows not, whether the answer he has put in to the Rule, and to which he is led by the general order of the court, to answer in writing, may not be considered a contempt. If so, he has only to observe, that if interrogatories had been filed, leading to specific objects, or motives, they would have been specifically answered. This not having been done, he is left to conjecture the import of the Rule; and that conjecture, has led him to suppose. that a justification of the words used, by a fair and candid examination, of the opinion of the learned Judge, and to excuse and palliate them, is the object sought to be obtained by the Rule, both of which the respondent hopes will be found in the answer intended to be filed.

All of which, is respectfully submitted, to be filed of record, by. JOHN A. FISHER.

Harrisburg, Sept. 7, 1827.

DAUPHIN COUNTY, sct.



I do hereby certify that the foregoing is a correct copy, of the original answer remaining on file in my office, and that the same was filed of record, and read in open court on the 7th day of September, 1827.

In testimony whereof I have hereunto set my hand and the seal of the court at Harrisburg, the 10, day of September, 1827.

FOR OBED FAHNESTOCK, Prot'h.
C. A. SNYDER.